FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 605

J. TOM WATSON, AS ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Petitioner,

vs.

J. EDWIN LARSON, AS TREASURER OF THE STATE OF FLORIDA, ET AL.,

Respondents

BRIEF OF RESPONDENTS OPPOSING PETITION FOR WRIT OF CERTIORARI

LEROY COLLINS,
LAWRENCE A. TRUETT,
JULIUS F. PARKER,
WILL M. PRESTON,
Attorneys for Respondents.

INDEX

Subject Index

	Page
Statement of the Case	1
Argument	
I. The Petitioner Shows No Personal Interest Sufficient to Invoke the Jurisdiction of This Court	2, 3, 4
II. The Questions Are Moot By Reason of Payment of Appropriated Amount by State of Florida to United States of America	4, 5, 6
III. The Appeal Is Frivolous	6, 7
IV. There Is Not Presented a Federal Question Under Subsection (b) of Title 28 of United States Code	8, 9
V. Application of Section 5 (a) of Rule 38 of The Rules of the Supreme Court Justify Denial of Petition for Writ of Certiorari	9, 10
Conclusion	11

Table of Cases Cited

	Page
Alabama State Federation of Labor, et al v. *McAdory,* Ala. 1945, 65 Sup. Ct. Rep. 1384, 325 U. S. 450, 89 L. ed. 1725	2
American Book Co. v. *Kansas,* 193 U. S. 49, 48 L. ed. 613, 24 Sup. Ct. Rep. 394	5
Atherton Mills v. *Johnson,* 259 U. S. 13, 16, 66 L. ed. 814, 816, 42 S. Ct. 422	5
Braxton County Court v. *West Virginia ex rel. Dillon,* 208 U. S. 192, 52 L. ed. 450	2
Brownlow v. *Schwartz,* 261 U. S. 216, 218, 67 L. ed. 620, 622, 43 S. Ct. 263	5
Caffrey v. *Oklahoma,* 177 U. S. 346, 44 L. ed. 799, 20 Sup. Ct. Rep. 664	2, 3
Cheong Ah Moy v. *United States,* 113 U. S. 216, 28 L. ed. 983, 5 Sup. Ct. 431	5
City of Clearwater, Florida v. *Beers* (Circuit Court of Appeals, Fifth Circuit) 90 F. 2d 80	5
Columbus & G. Ry. Co., et al v. *Miller State Tax Collector,* 283 U. S. 96, 75 L. ed. 866, 51 Sup. Ct. Rep. 392	2, 3

Page

Duke Power Company v. *Greenwood County*, 299 U. S. 259 5
In re Opinion of the Justices, (Mass.) 8 N. E. 2d 753 10
Jones v. *Montague*, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611 5
King v. *Sheppard*, (Texas) 157 S. W. 2d 682 10
Lee v. *Atlantic Coast Line Railroad Company*, 194 So. 252, 267, 268 6
Mills v. *Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132 5
Samuel Stewart as Treas. of Wyandotte Co., Kansas v. *City of Kansas City*, 239 U. S. 14, 66 L. ed. 121, 36 Sup. Ct. Rep. 15 2
Scudder v. *New York*, 175 U. S. 32 8
Smith v. *Indiana*, 191 U. S. 138, 148, 48 L. ed. 125, 126, 24 Sup. Ct. Rep. 51 ..... 2, 3
Thomas R. Marshall as Gov. of State of Indiana, et al v. *John T. Dye*, 231 U. S. 250, 34 Sup. Ct. Rep. 92, 58 L. ed. 208 2
United States v. *Anchor Coal Co.*, 279 U. S. 812, 73 L. ed. 971, 49 S. Ct. 262 5
United States v. *Hamburg-Amerikanische Packetfahrt-Actien Gessellschaft*, 239 U. S. 466, 478, 60 L. ed. 387, 391, 392, 36 S. Ct. 212 5
Via v. *State Commission on Conservation*, 9 F. Supp. 556, on Appeal 296 U. S. 549 9
Voeller v. *Neilston Warehouse Co.*, Ohio 1941, 61 Sup. Ct. Rep. 376, 311 U. S. 531, 85 L. ed. 322 2
Wilson v. *Shaw*, 204 U. S. 24 ..... 4, 5
Yarborough v. North Carolina Park Commission, (N. C.) 145 S. E. 563 10

STATE STATUTES

Chapter 23616, Laws of Florida, Acts of 1947 ..... 4, 6
Chapter 87, Cumulative Supplement to Florida Statutes 1941 6

STATE CONSTITUTION

Sec. 2, 3 and 4, Article IX 1

UNITED STATES STATUTES

Sec. 344 (b) Title 28, U. S. Code 1, 8

STATEMENT OF THE CASE

Review by Certiorari is sought under Sec. 344 (b) Title 28 Judicial Code by the Attorney General of Florida who was the plaintiff in the original cause in the Circuit Court for Leon County, Florida. The propriety of such review is denied by the Treasurer of Florida, the Trustees of the Internal Improvement Fund, and the Everglades National Park Commission, statutory agencies of said state, all being defendants in the Court of original jurisdiction.

The bill of complaint by which the Petitioner's grievances were set forth (R. 1-4) contains not a single allegation of the violation of any clause or section of the United States Constitution. The relief sought was an injunction against the expenditure of two million dollars of state funds. The Circuit Court of the state dismissed the bill on motion because it was found insufficient. The Supreme Court of Florida reviewed the case and unanimously affirmed the Circuit Court (R. 19-21). In its decision the Supreme Court of Florida found:

> "The real gist of the bill is in paragraph IX which reads:
>
> > 'The said Chapter violates Sections 2, 3 and 4 of Article IX of the Constitution of Florida, in that the appropriation attempted to be made constitutes a gift of the money belonging to the people of the State of Florida to the United States and the appropriation of said money is not a state purpose and the expenses to be made out of said fund are not state expenses.' "

ARGUMENT

The Petition should be denied on the following grounds:

I

The Petitioner Shows No Personal Interest Sufficient To Invoke the Jurisdiction of This Court

The Petitioner brought the original proceeding, prosecuted his appeal to the State Supreme Court, and filed his petition herein in his official capacity "as Attorney General of the State of Florida." In a long line of cases this Court has held that to invoke jurisdiction here a party raising a question of the constitutionality of a state act must show that he is *personally* interested in and adversely affected by the decision of the state court upholding the act. Braxton County Court v. West Virginia ex rel. Dillon, 208 U. S. 192, 52 L. ed. 450; Smith v. Indiana, 191 U. S. 138, 148, 48 L. Ed. 125, 126, 25 Sup. Ct. Rep. 51; Caffrey v. Oklahoma, 177 U. S. 346, 44 L. Ed. 799, 20 Sup. Ct. Rep. 664; Columbus & G. Ry. Co., et al v. Miller State Tax Collector, 283 U. S. 96, 75 L. ed. 866, 51 Sup. Ct. Rep. 392; Alabama State Federation of Labor, et al v. McAdory, Ala. 1945, 65 Sup. Ct. Rep. 1384, 325 U. S. 450, 89 L. ed. 1725; Voeller v. Neilston Warehouse Co., Ohio 1941, 61 Sup. Ct. Rep. 376, 311 U. S. 531, 85 L. Ed. 322; Samuel Stewart as Treas. of Wyandotte Co., Kansas v. City of Kansas City, 239 U. S. 14, 66 L. ed. 121, 36 Sup. Ct. Rep. 15; Thomas R. Marshall as Gov. of State of Indiana, et al vs. John T. Dye, 231 U. S. 250, 34 Sup. Ct. Rep. 92, 58 L. ed. 208.

In Braxton County Court v. West Virginia ex rel. Dillon, supra, it was stated squarely that:

> "Again, that the act of the state is charged to be in violation of the national Constitution, and that the charge is not frivolous, does not always give this court

jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the state court sustaining the act, and the interest must be of a personal, and not of an official, nature."

The Court further quoted with approval from Smith v. Indiana, supra, the following:

> " 'These authorities control the present case. It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their nonperformance was equally so. He neither gained nor lost anything by invoking the advice of the supreme court as to the proper action he should take. He was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers; and in this particular the case is analogous to that of Caffrey v. Oklahoma, 177 U. S. 346, 44 L. ed. 799, 20 Sup. Ct. Rep. 664. We think the interest of an appellant in this court should be a personal, and not an official, interest, and that the defendant, having sought the advice of the courts of his own state in his official capacity, should be content to abide by their decision.' "

Directly in point also is the following expression from Columbus & G. Ry. Co. v. Miller, supra,

> "While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the state the constitutional validity of a state statute is a local question, this fact does not alter the fundamental principle, governing the determination of the federal question by this court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the amendment forbids. The constitutional guaranty does not extend to the

mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

II

The Questions Are Moot by Reason of Payment of Appropriated Amount by State of Florida To United States of America

Affidavit of J. Edwin Larson, one of the Respondents in this case, affirmatively shows that the warrant issued by the Governor of the State of Florida in accordance with the appropriation contained in Chapter 23616, Laws of Florida, Acts of 1947, and payment thereof in all respects has been completed and as Treasurer he has no further control or authority of any kind over the use of said funds (R. 26). The Bill of Complaint is bottomed and predicated upon enjoining the payment of the funds appropriated by Chapter 23616, Laws of Florida, Acts of 1947, in that the four lengthy sections therein (V, VI, VII and VIII) relating to boundaries of the Everglades National Park, oil rights and fishing privileges do not pretend to show any violation or purported violation of statutory or constitutional law (R. 1-4). Such payment is a fait accompli and there is nothing left to enjoin.

As to the Petitioner and his petition, the questions present merely mock issues and are moot. The petition should not be entertained by the Court, in that on a bill to restrain a public officer from paying money that has been paid, the question of right is a moot question. Wilson v. Shaw, 204 U. S. 24, on appeal to the Supreme Court of the United States, was an action to restrain the Secretary of the Treasury of the United States from paying $40,000,000

and $10,000,000 in connection with the construction of the Panama Canal, after the amounts had been paid, was held moot; Duke Power Company v. Greenwood County, 299 U. S. 259; and City of Clearwater, Florida v. Beers (Circuit Court of Appeals, Fifth Circuit), 90 F. 2d 80.

In Wilson v. Shaw, supra, Justice Brewer said:

> "If the bill was only to restrain the Secretary of the Treasury from paying the specific sums named therein, to wit, $40,000,000 to the Panama Canal Company, and $10,000,000 to the Republic of Panama, it would be sufficient to note the fact, of which we may take judicial notice, *that those payments have been made, and that whether they were rightfully made or not is, so far as this suit is concerned, a moot question.* Cheong Ah Moy v. United States, 113 U. S. 216, 28 L. ed. 983, 5 Sup. Ct. 431; Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; American Book Co. v. Kansas, 193 U. S. 49, 48 L. ed. 613, 24 Sup. Ct. Rep. 394; Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611."

In Duke Power Company v. Greenwood County, supra, the opinion of this Court reads in part as follows:

> "Where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss. See United States v. Hamburg-Amerikanische Packetfahrt-Actien Gessellschaft, 239 U. S. 466, 475, 478, 60 L. ed. 387, 391, 392, 36 S. Ct. 212; Atherton Mills v. Johnson, 259 U. S. 13, 16, 66 L. ed. 814, 816, 42 S. Ct. 422; Brownlow v. Schwartz, 261 U. S. 216, 218, 67 L. ed. 620, 622, 43 S. Ct. 263; United States v. Anchor Coal Co. 279 U. S. 812, 73 L. ed. 971, 49 S. Ct. 262."

In City of Clearwater v. Beers, supra, Circuit Judge Holmes said:

> "It is well settled that courts refuse to pass upon moot questions."

and cited numerous decisions of the Supreme Court of the United States in support of such well-settled rule of law.

III

The Appeal Is Frivolous

A Federal constitutional question was not directly or indirectly raised or presented in Petitioner's pleadings or otherwise in the Circuit Court in and for Leon County, Florida, the court of original jurisdiction (R. 1-4). The Supreme Court of Florida evidently recognized the frivolous nature of the fourth, fifth, ninth and tenth assignment of errors (R. 19-21) which purportedly but without foundation in pleading or otherwise asserted certain Federal questions. Only the tenth assignment mentions the constitution of the United States (R. 21). Certainly that court recognized its previous ruling in Lee v. Atlantic Coast Line Railroad Company, 194 So. 252, 267, 268, where it held that questions not involved in the pleadings nor presented to the lower court would not be discussed on review, and said ". . . we fail to find where this question was presented to the lower court . . . nor do we find it involved in the pleadings. Therefore, we shall not discuss it." The record is barren of any contention that the Florida Statute in question was repugnant to the Federal constitution (R. 1-18) until the unjustified and impotent appearance of the aforesaid four assignment of errors after the case had gone against Petitioner in the Circuit Court.

A further reason in support of this ground is that the bill of complaint filed in the Circuit Court in and for Leon County, Florida, sought (in the words of Petitioner) a declaratory decree under chapter 87, Cumulative Supplement to Florida Statutes, 1941, as to the construction, validity and constitutionality of said chapter 23616, Laws

of Florida, Acts of 1947 (R. 2-3). In the Circuit Court Petitioner asked for answers to five (5) questions (R. 4), including advice as to whether certain sections of the constitution of Florida were violated (section IX of Bill of Complaint (R. 3-4). The character and type of Petitioner's declaratory judgment action (R. 1-4) and the subsequent attempt to have the four assignment of errors supply a deficiency in pleadings and other presentation in the lower court as to Federal constitutional questions negatives the soundness of Petitioner's position in this Court. Petitioner sought a declaratory judgment and alleged certain violations of the Florida constitution; he lost in the court of original jurisdiction; and he then filed certain assignments of errors purporting to set up violations of the Federal constitution and in an obvious attempt to set up or save Federal questions unsupported by his pleadings or other presentations in the court of original jurisdiction.

In item 1 of Specification of Errors (page 10 of Petition) the contention is made that the Secretary of the interior has no legal right to accept and utilize the appropriated funds. This question was not raised or presented by the bill of complaint or otherwise in the Circuit Court in and for Leon County, Florida. Legal falderal is ineffective to litigate questions in this Court which were not raised in the court of original jurisdiction by way of pleadings or otherwise but which were sought to be raised subsequent to post-dismissal decree by abortive assignments of errors not based upon the record.

IV

There Is Not Presented a Federal Question Under Subsection (b) of Section 344, Title 28 of United States Code

All that has been said under point II is applicable to this discussion.

Careful search of the Bill of Complaint (R. 1-4) and all other proceedings in the Circuit Court in and for Leon County, Florida (R. 5-18) will show that the validity of the Florida Statute was not drawn in question on the ground of it being repugnant to the constitution of the United States. Since no such ground was presented to said Circuit Court or considered by such Court and since any purported repugnancy raised on appeal was not properly before the Supreme Court of Florida for consideration or even discussion this Court has no jurisdiction of the matter under Section 344 (b) of Title 28 of the United States Code. A long line of decisions of this Court supports this well-established rule of law. For example, see Scudder v. New York, 175 U. S. 32, where it was held that failure to raise a Federal question until after a case has been finally decided in the highest state court will preclude a writ of error to the Supreme Court of the United States.

What Petitioner did was to frame his whole case in the Circuit Court on purported violations of the Florida constitution. The decision of the Supreme Court of Florida shows that the real gist of the Bill of Complaint was the violation of certain provisions of the Florida constitution (R. 27). Such questions do not come within Section 344(b) of Title 28 of the United States Code and hence Federal questions are not involved in this case. It is impossible upon the record in this case to avoid the conclusion that it never occurred to Petitioner to raise Federal questions

until after the case had been finally decided against him in the Circuit Court. No such grounds having been presented, it cannot be said that the Circuit Court and the Supreme Court of Florida have disregarded the constitution of the United States. Hence, this Court has no jurisdiction.

V

Application of Section 5(a) of Rule 38 or the Rules of the Supreme Court Justify Denial of Petition For Writ of Certiorari

Section 5 of this Rule 38 recognizes that a review on writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only when there are special and important reasons therefor. One of the factors for consideration is where a state court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

First, no Federal question of substance was presented to either the Circuit Court in and for Leon County or the Supreme Court of Florida. Secondly, if such a question had been so decided, it was in accord with an applicable decision of this Court. In Via v. State Commission on Conservation, 9 F. Supp. 556, a suit seeking to invalidate the proceedings taken by defendant to establish the Shenandoah National Park on Federal and other constitutional grounds was dismissed. On appeal to this Court the decree was "affirmed on the ground that appellant has an adequate remedy at law." 296 U. S. 549. If any of the monies delivered to the Federal Government by the State of Florida under the Florida Statute in question are ever used by the Federal Government to take or condemn prop-

erty, then the affected party, whether he be the Petitioner or a land owner, will have his day in court through an adequate remedy at law.

The assailed Florida Statute has for its purpose one of the plans, methods and arrangements with the United States of America for the immediate creation, establishment and development of the Everglades National Park. Such acts have been upheld uniformly and there are no cases to the contrary.

In re Opinion of the Justices,
(Mass.), 8 N. E. 2d 753;

Yarborough v. North Carolina Park Commission,
(N. C.) 145 S. E. 563; and

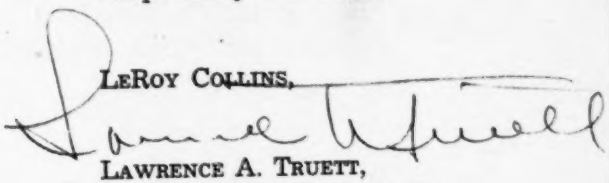
King v. Sheppard,
(Texas) 157 S. W. 2d 682.

It follows that by reason of the decisions of this Court and courts of other jurisdictions the decision of the Florida Supreme Court was in strict accord with all decisions affecting the establishment of national parks through cooperation of a State of this nation.

CONCLUSION

The questions are moot. The Petitioner shows no personal interest. There is no substantial Federal question involved. The nonfederal questions are genuine and adequate. A denial of the Petition For Writ of Certiorari is fully justified.

Respectfully submitted,



LEROY COLLINS,

LAWRENCE A. TRUETT,
Ausley, Collins & Truett,
Tallahassee, Florida

JULIUS F. PARKER,
Parker, Foster & Wigginton,
Tallahassee, Florida

WILL M. PRESTON,
Loftin, Anderson, Scott, McCarthy & Preston,
Miami, Florida

Attorneys for Respondents.

Receipt of a copy of the foregoing brief is acknowledged this...11th.....day of March, A. D. 1948.

J. TOM WATSON,
Petitioner.

_____

Attorney for Petitioner.